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No. 205

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Public Utilities Commission (R. 6–19) is reported at 50 Cal. P. U. C. 749. The order of the Supreme Court of the State of California denying the writ of review without opinion (R. 68) is reported at 38 Adv. Cal. 323.

JURISDICTION

The Supreme Court of the State of California entered its order denying a writ of review on

January 21, 1952 (R. 68). A petition for rehearing, seasonably filed, was denied on February 18, 1952 (R. 74). By order of Mr. Justice Douglas, dated April 17, 1952, the time for filing a petition for a writ of certiorari was extended to and including July 17, 1952 (R. 75). The petition for a writ of certiorari was filed on July 16, 1952 and was granted on October 13, 1952 (R. 77). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

The ultimate question is whether under the Federal Power Act the California Public Utilities Commission has jurisdiction, to the exclusion of the Federal Power Commission, which also has asserted sole jurisdiction, over the sales of electric energy in California by the California Electric Power Company for use in connection with the Navy Department's Ammunition Depot at Hawthorne, Nevada.

More specifically, the principal questions presented are:

1. Whether the sales are in interstate commerce.

2. Whether the interstate sale to the Navy is a "sale of electric energy to any person for resale" subject to federal, rather than state, regulation under Part II of the Federal Power Act, where (a) the Navy's resales are to the tenants of its housing development and to business concessions on the naval reservation and (b) a substan-

tial part of the energy so furnished by the Company is generated at hydroelectric projects licensed under Part I of the Act.

3. Whether, since the Navy's purchases and sales are not subject to regulation by Nevada, California is the only "state directly concerned" with the sales of electric energy by the Company to the Navy, within the meaning of Section 20 of Part I of the Federal Power Act, and, hence, has independent rather than coordinate jurisdiction with Nevada over the Company's rates for these interstate sales of electric energy to the Navy.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U. S. C. 791a *et seq.*) are set out in Appendix A, *infra*, pp. 74–82.

STATEMENT

Respondent California Electric Power Company (hereafter termed Company) is engaged in the business of generating and distributing electric energy in the States of California and Nevada (R. 1, 7). It renders public utility service in several counties in California, and its Nevada Division serves parts of Nye and Esmeralda counties, Nevada (R. 7).

Since July 1, 1943, the Company has been selling to the Navy Department, under contract, electric energy required "for use of the Government's

Naval Ammunition Depot, Hawthorne, Nevada" (R. 2, 10, 45). In addition, since 1936—and most recently under a three-year contract dated October 5, 1945—the Company has been selling energy to Mineral County, Nevada, petitioner in No. 206, a municipally owned utility, which resells the energy so purchased to its retail customers in Nevada (R. 8, 9, 26).

A large percentage of the energy so furnished to the Navy and Mineral County is generated at the Company's hydroelectric projects located in California, which projects are licensed by the Federal Power Commission under Part I of the Federal Power Act; at times, however, all or a portion of the energy comes from non-licensed sources and other electric production agencies within California with which the Company maintains interconnections (R. 2, 11, 45). Irrespective of where in California it is generated, the energy sold to the Navy and Mineral County is transmitted at 55,000 volts to the Company's Mill Creek substation in California, where it is delivered to the Navy and Mineral County (R. 2, 11, 45). The latter in turn transmit the energy over their own 55,000 volt lines across the California-Nevada state boundary to Hawthorne, Nevada, where it is reduced to distribution voltage (R. 2, 8). Each of these transmission lines is approximately 55 miles in length, about one-half being in California and the other half in Nevada (R. 8).

At Hawthorne, in addition to using the energy purchased from the Company for the power and energy requirements of its general activities, the Navy furnishes approximately 25% (R. 28) thereof to the tenants of the Naval personnel quarters ("public quarters"), as well as to tenants of the "Navy Low-Cost Housing Project" (known as Babbitt) which provides living quarters and facilities for civilians connected with the Depot (R. 2, 11, 46). The Navy makes a separate charge to each of the tenants of these living quarters and business concessions for the electric energy furnished them (R. 2, 46). The sales to the tenants were metered deliveries made under written contract at the rate of 1½ cents per Kwhr (R. 32), and the only reason the service was not rendered by the local electric utility (Mineral County) was the latter's financial inability to undertake the business. No. 495, this Term, Tr. of Record, pp. 289, 293.[1] Residence or operation of business concessions at Babbitt is permitted only so long as it is consistent with the Navy's obligations. The lease agreements with the occupants of the "public quarters" and of Babbitt

[1] Under California practice, the record of the joint hearing before the California Commission and the Federal Power Commission (see *infra*, p. 7) was not required to be transmitted to the Supreme Court of California on the petition for review, and the California Public Utilities Commission has declined to forward it to this Court. The record, however, was certified to the Ninth Circuit in the review of the Federal Power Commission's order in *California Electric Power Company* v. *Federal Power Commission*, No. 12987, (see *infra*, p. 8, and is now before this Court in the petition for certiorari in No. 495.

provide that the rental privilege ceases upon termination of employment; for the business concessions, the Navy issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot" (R. 14–15).

By decision dated July 1, 1948, respondent Public Utilities Commission of the State of California (hereafter termed California Commission) authorized a general rate increase for the Company to be effective August 1, 1948, and in connection therewith prescribed special schedules including so-called P–2 and P–3 Schedules to replace a substantial number of special rate contracts, with which the California Commission was dissatisfied (R. 2, 7, 8–9). On July 30, 1948, the Company sought to terminate its contract with the Navy and to apply, as of October 1, 1948, the P–2 Schedule to its sales to the Navy (R. 2, 9). In addition, the Company failed to renew its contract with Mineral County, which expired by its own terms on October 5, 1948, intending thereby to apply the P–3 Rate to its sales to Mineral County (R. 9). Thereafter, the Company applied to the California Commission for a ruling whether the P–2 and P–3 Schedules were applicable to the sales to the Navy and Mineral County, respectively, since the Navy and Mineral County claimed, among other things, that the California Commission did not have jurisdiction over the rates charged them by the Company (R. 2, 6–7).

A hearing on this application was held by the California Commission on October 7, 1949 (R. 3, 7). That Commission also scheduled further hearings but took them off its calendar when the Federal Power Commission (hereafter termed Federal Commission) indicated, through correspondence, a desire to explore the question of jurisdiction (R. 7).[2] The Federal Commission, on February 15, 1950, issued an order to the Company to show cause why the Company's sales to the Navy and Mineral County were not subject to its jurisdiction under the Federal Power Act, and thereafter, pursuant to mutual agreement between the two commissions, concurrent hearings were held on March 20 and 21, 1950, on the jurisdictional questions involved (R. 3, 7).

On April 13, 1951, the Federal Commission issued its opinion and order, holding that under the Federal Power Act it had exclusive jurisdiction over the Company's sales to the Navy and Mineral County and directing the Company to file the 1943 contract with the Navy and to charge no rate other than those set forth in that filing and in the 1945 contract with Mineral County

[2] For 13 years the Company and its predecessor had without question filed with the Federal Commission its rates for service to Mineral County (R. 26). On October 15, 1948, the Company had submitted for filing with the Federal Commission a new rate applicable to Mineral County, presumably the P-3 rate, representing a 43% increase (R. 27). The Company did not complete the filing by submitting the data required by the Commission's rules to support the proposed increase in rates, and in March 1949 advised the Federal Commission that it had decided not to complete the filing (R. 27).

previously filed, until duly superseded by new rates filed in accordance with the Federal Commission's Rules and Regulations (R. 24–41). Opinion No. 212 in F. P. C. Docket No. E–6269; *Re California Electric Power Company,* 89 PUR (NS) 359. On June 5, 1951, the Federal Commission denied applications for rehearing filed by the Company and the Legal Department of the California Commission, and on June 20, 1951, the Company filed a petition for review of the Federal Commission's order in the Court of Appeals for the Ninth Circuit, as authorized by Section 313 (b) of the Federal Power Act. *California Electric Power Company* v. *Federal Power Commission,* C. A. 9, No. 12987. The California Commission presented its view to the Ninth Circuit as *amicus curiae,* orally and by brief. On October 14, 1952, the Court of Appeals affirmed the order of the Federal Commission, and denied the Company's petition for rehearing on November 12, 1952. A petition for certiorari was filed December 11, 1952, No. 495. The opinion of the Ninth Circuit is reproduced in Appendix B, *infra,* pp. 83–91.

On July 3, 1951, the California Commission issued its order and opinion in which it concluded, on substantially the same record as that before the Federal Commission, that notwithstanding the Federal Commission's prior ruling, it, rather than the Federal Commission, had exclusive jurisdiction over these sales. According to the California Commission, the State's power

to regulate was not barred either by the Commerce Clause or the Federal Power Act, even if it be assumed that the sales were in interstate commerce (R. 11). In reaching this conclusion, the California Commission ruled that Nevada, not having authority over the Navy's purchases or sales of electric energy, was not "directly concerned" with the Company's sales to the Navy within the meaning of Section 20 of Part I of the Federal Power Act (Appendix A, *infra*, pp. 75–76), that the California Commission was the kind of state "commission or other authority" there contemplated, and consequently that it had sole jurisdiction over a sale under that Section (R. 11–12, 13–14).

The California Commission went on to hold that this jurisdiction was not ousted by the Federal Commission's authority under Part II of the Federal Power Act. While admitting that "the Navy is in a sense 'reselling' energy purchased from" the Company (R. 15), it held sales to the Navy not to be within the jurisdiction conferred upon the Federal Commission by Part II because not sales to a "person" as defined in Section 3 (4) of the Act (R. 14). In addition, it held that "sale for resale," as used in Part II, embraces only sales for resale to companies engaged in the public utility business, and not sales to tenants of the reseller (R. 14–15). Finally, the Commission ruled that, since these sales were regulable by the

State under Section 20 of Part I, federal regulation under Part II was precluded by Section 201 (a) and (b) of the Act, *infra*, pp. 76–77 (R. 15–16).

On the basis of these rulings, the California Commission concluded that the Company's sales to the Navy were subject to its jurisdiction, rather than that of the Federal Commission (R. 19).[3] The California Commission, accordingly, authorized the Company to charge the Navy at the rates set forth in the P–2 Schedule (R. 19).[4]

[3] As to the sales to Mineral County, the California Commission recognized that Nevada was "concerned" with the rates charged to Mineral County (R. 16–17). The California Commission held, however, that Nevada as well as California had provided "a commission or other authority to enforce the requirements of [Section 20 of Part I] within such state," since, according to the California Commission, the Nevada Commission has jurisdiction over the rates charged by Mineral County to its customers (R. 17). In addition, the California Commission ruled that since the Nevada Commission had taken a neutral position at the concurrent hearing, there was no inability to agree under Section 20 (R. 18). From these rulings, the California Commission concluded that it had jurisdiction over the sales to Mineral County under Section 20 of Part I (R. 18).

The California Commission went on to conclude that it, rather than the Federal Commission, also had jurisdiction under Part II, holding (1) that the sales to Mineral County, although for resale, were not to a "person" under Section 3, and (2) that since it had jurisdiction under Section 20, "the proviso clauses of Sections 201 (a) and 201 (b) apply" (R. 18). The California Commission, accordingly, directed the Company to charge the P–3 Rate to Mineral County (R. 19).

[4] The California Commission authorized, rather than directed, the Company to charge these rates to the Navy since its General Order No. 96 authorized utilities to furnish elec-

The California Supreme Court (three judges dissenting) denied the petitions for review filed by the United States and by Mineral County in accordance with Section 67 of the Public Utilities Act of California (now Public Utilities Code, Sections 1756–1760),[5] and affirmed without opinion (R. 68).

SUMMARY OF ARGUMENT

The California Commission's holding, that it, rather than the Federal Commission, has jurisdiction over the Company's sale of energy to the Navy is in square conflict with the Federal Commission's contrary conclusion, affirmed by the

tric service "at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments" (R. 12). The Company, pursuant to this authorization, is seeking to charge the Navy the full P-2 rate thus sanctioned by the California Commission.

[5] In so far as here pertinent, Section 67 provides:

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state, for a writ of certiorari or review * * * for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. * * * No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *provided*, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases."

Ninth Circuit, as to this very transaction. We submit that the Ninth Circuit is right and California wrong.

I

Despite the Company's contention, the California Commission properly assumed that the sale was in interstate commerce. The Company's transmission of the energy within California to a point in that state and sale for transmission and ultimate consumption in Nevada presents a classic situation conclusively established to be in interstate commerce. *Powell* v. *U. S. Cartridge Co.*, 337 U. S. 497, 512, reveals the fallacy in the claim that interstate commerce is not involved because the energy is transmitted into Nevada by the Navy for military rather than commercial purposes. In comparison with the *Powell* case, where the Court rejected substantially the same contention and reaffirmed that interstate commerce includes movements across state lines for non-commercial purposes, the instant case is an *a fortiori* one.

Section 201 (f) of the Federal Power Act does not help the Company. That Section was intended to exempt the United States as a wholesale seller from the regulatory burdens of the Act and not, as urged by the Company, to limit the scope of Part II, or to deprive the Government as a purchaser at wholesale of the benefits of regulation of the rates charged to it by its vendor.

II

The three grounds on which the California Commission based its conclusion that the Company's sales to the Navy, which in turn resells a substantial portion thereof to the residents of its housing projects, are not sales at wholesale, *i. e.*, "for resale" within Sections 201 (b) and (d) of the Federal Power Act, are without merit.

A. The mechanical application of the statutory definition of "person" adopted by the California Commission to exclude the United States and Mineral County from "person" as used in the wholesale sale definition of Section 201 (d) seems to have been rejected *sub silentio* by this Court in *Connecticut Light & Power Company* v. *Federal Power Commission*, 324 U. S. 515. It has been expressly rejected by three unanimous courts of appeal which reached a result which gives effect to the purpose of the Act, the statutory language read in the light of recognized rules of statutory construction, the legislative history, and the consistent administrative interpretation.

The need of the protection intended to be afforded by the Federal Power Act becomes apparent as far as sales for resale to the Federal Government and local governmental agencies are concerned when it is realized that the number of such sales is substantial. The California Commission's contrary holding imputes to Congress the anomalous intent to deny to the Federal

Government, whose financial interests are directly concerned, the federal protection which it provided for non-governmental purchasers. In addition, it would leave public utilities with complete freedom to indulge in the rankest discrimination against municipal purchasers for resale, a result clearly at odds with the provisions and purposes of the Act. The manifest departure from the congressional purposes which adherence to literal language would thus involve amply justifies following the purpose of the Act, rather than its literal words.

This is especially true since the statutory definitions relied on by California are of the general concepts of "person" and "corporation." It is established that such general definitions are not to be applied mechanically to government, state or federal, particularly in an unusual case such as we have here. Instead, all pertinent indicia of legislative intent must be given weight, with the ultimate criterion being the intention of Congress, not a general definition framed with other purposes in view.

The legislative history reveals that "person" was included in the definition contained in Section 201 (d), not for the purpose of curtailing the Federal Commission's jurisdiction, but to close an obvious loophole in another aspect of an earlier wording and thereby to broaden the Commission's authority. Indeed there is nothing in the legislative history of Section 201 (d) or of

Section 3 evidencing any intention or even awareness that the artificially restricted definitions of Section 3 would carry over to Section 201 (d) so that this important class of wholesale sales would be exempt from federal regulation. This contrasts sharply with the specific Congressional reference to other exemptions when intended.

In all cases in which this question has been raised, the Federal Commission has consistently construed the statute as giving it jurisdiction to regulate sales for resale to governmental bodies, such as the United States and municipalities. This executive interpretation—sustained by three courts of appeals—is an additional aid to construction and entitled to great weight.

B. The California Commission's further ground, that "sale for resale" as used in Section 201 (d) was intended to be limited to such sales when made to companies in the public utility business and consequently not to include such sales where, as here, the resale is to tenants of the reseller, is also without merit. There is nothing in *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83, upon which California relies, to support the suggested distinction, nor has Congress, in considering that case in connection with the enactment of the Federal Power Act, regarded it as being so limited. On the contrary, the Committee Reports, as well as the pertinent comments at the hearings and on the floor of Congress, construe *Attleboro* broadly,

and plainly reveal an intent to confer authority upon the Federal Commission over all wholesale sales regardless of the character of the resale.

C. The California Commission's final ground, which in effect is that because the Company generates power at projects licensed under Part I of the Power Act, its rates are subject to regulation by California under Section 20 of Part I and, accordingly, not by the Federal Commission under Part II, has already been rejected by this Court in the *Penn Water* case, 343 U. S. 414, 424.

In any case, the California Commission does not have jurisdiction under Section 20 of Part I, which permits joint regulation of interstate sales of hydroelectric energy by the states directly concerned when each has a regulatory body qualified under that section and they are able to agree. Contrary to the ruling of the California Commission, the doctrine of intergovernmental immunity no more precludes Nevada from regulating the Company's sale to the Navy, than it does California. And apart from intergovernmental immunity, it is clear that the sale to the Navy for consumers in Nevada is of concern to Nevada as well as to California. Hence, whatever jurisdiction California might have over the sales by virtue of Section 20 is shared with Nevada and could not be exercised by California acting alone. A mere reading of the pertinent statutes, moreover, shows that Nevada has failed

to provide "a commission or other authority to enforce the [Section's] requirements * * * within such State." This renders it impossible for a properly constituted authority of Nevada to agree with the California Commission concerning the rates to be charged to the Navy. Furthermore, Nevada has not agreed. Thus Section 20 itself operates to place jurisdiction over the sales in the Federal Commission.

D. The additional contentions of the Company, not reached by the California Commission, are also insubstantial.

1. The argument that Part II applies only when the rate at which the energy is resold at retail is subject to state regulation finds no support in statutory language and is inconsistent with the Federal Commission's consistent interpretation of the rate regulatory provisions; it ignores the legislative history, and overlooks the significant fact that here, since the Navy is the purchaser which is reselling, the burden of excessive rates falls inevitably upon the ultimate consumers or the nation's taxpayers.

2. The fact that the resales are not specifically provided for in the contract is immaterial since it is undisputed that the Company knew of the resales. The Act does not make the Federal Commission's jurisdiction dependent upon the terms of a contract. Since the contract can be phrased to suit the whims and objectives of either party, the Company's argument, if accepted, would open

the way to easy circumvention of federal regulation.

3. Similarly, the Federal Commission is not ousted of jurisdiction because the Navy resells only 25% of the energy purchased. The Company's contention seeks to raise again old objections as to the Federal Commission's jurisdiction over commingled energy, which have been consistently rejected by the Commission and the courts, most recently by this Court in the *Penn Water* case, 343 U. S. 414.

4. Finally, these sales are not within the exception contained in Section 201 (b) for "facilities used in local distribution." On the facts, the facilities from which the sales are made are not "used in local distribution," as this phrase was interpreted in *Federal Power Commission* v. *East Ohio Gas Co.*; 338 U. S. 464. In addition, the Act does not make the Federal Commission's jurisdiction over sales for resale dependent upon the nature of the facilities involved in effecting the sales.

ARGUMENT

In this case, the California Commission assumed that the Company's sales of electric energy to the Navy were in interstate commerce but nevertheless held that, as it construed the Federal Power Act, jurisdiction over these sales was left or vested in it rather than the Federal Power Commission. The latter, on the other hand, in *Cali-*

fornia Electric Power Company, 89 PUR(NS) 359, affirmed *sub nom. California Electric Power Company* v. *Federal Power Commission*, C. A. 9, No. 12987 (decided October 14, 1952), App. B, petition for certiorari pending, No. 495, *infra*, pp. 83–91, has read the Federal Power Act as conferring jurisdiction on it over the same sales by the Company. Inasmuch as it is common ground among the parties that only one regulatory body can have jurisdiction over these sales, the ultimate question presented is which of the two agencies, state and federal, has jurisdiction.

We believe—and we will demonstrate below—that the California Commission misread the Power Act and that, properly construed, that Act vests jurisdiction over these sales in the federal, rather than the state, regulatory body. The California Commission properly assumed, however, that these sales are in interstate commerce. The Company has questioned whether the sales are in interstate commerce (Br. in Opp., pp. 4–7), and since it is basic to the applicability of the Power Act that the transaction be in interstate commerce, we first discuss the interstate commerce question and show in Point I that the Company's claims in regard thereto are without merit. We then demonstrate in Point II that these sales are sales at wholesale, within the Federal Commission's jurisdiction under Part II of the Power Act. We shall also show that these sales, made by a company licensed under Part I, are subject to

federal, rather than state, regulation under Section 20 of that Part.[6]

I

THE COMPANY'S SALES TO THE NAVY ARE IN INTERSTATE COMMERCE

There can be no doubt that the sale here involved is in interstate commerce. Here the Company first transmits the energy within the State of California to its Mill Creek Station in that state, and there it sells and delivers the energy for transmission across the California-Nevada state line for ultimate consumption in the State of Nevada. These facts bring the instant case squarely within the decisions of this Court which establish conclusively that sales for immediate interstate shipment are a part of interstate commerce. *Currin* v. *Wallace*, 306 U. S. 1, 10, and

[6] The California Commission's further holding that state regulation of this sale would not be a burden on interstate commerce, and hence is not barred by the Commerce Clause, is not discussed. While such a ruling would be pertinent if Congress had not undertaken to provide regulation (cf. *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 29-31); it has no relevance where Congress, by the Federal Power Act, has created a comprehensive and effective scheme of dual regulation (cf. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329) and vested jurisdiction over sales of this type in the Federal Commission (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, *supra*, at 524).

cases cited; *Mulford* v. *Smith*, 307 U. S. 38, 47–48; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381. In the *Currin* case this Court stated (306 U. S. at 10):

> * * * So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *Swift & Co.* v. *United States*, 196 U. S. 375, 398, 399; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290, 291; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 54; *Stafford* v. *Wallace*, 258 U. S. 495, 519; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10.

The Daniel Ball, 10 Wallace 557, establishes that a person who transports a product on a portion of an interstate, through journey, even though his portion of the transportation occurs entirely within a single state, is engaged in interstate commerce. See also, *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 228–229. The same is obviously true as to a sale for interstate shipment, even though the seller never crosses the state line. This Court has so held with respect to the Federal Power

Act itself. *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 70–71. See also *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 688; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 508; *Peoples Natural Gas Co.* v. *Federal Power Commission*, 127 F. 2d 153 (C. A. D. C.), which hold that in the closely related Natural Gas Act Congress intended "interstate commerce" to have the same meaning as "that which theretofore had been given to it in the opinions of this Court." 331 U. S. at 688.

The Company claims that the fact that the transmission of energy across the state boundary is by the Navy removes the transaction from the ambit of interstate commerce. The argument is that Navy transmission is for military rather than commercial purposes. This is substantially the same contention which the Court recently rejected in *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 512, where it was unsuccessfully argued that the interstate shipment of munitions by the Army did not constitute interstate commerce. That case reaffirmed the oft accepted principle that interstate commerce includes movements across state lines for noncommercial purposes.[7] In compari-

[7] See *United States* v. *Hill*, 248 U. S. 420, 423–424 (transportation of whiskey for personal consumption); *Edwards* v. *California*, 314 U. S. 160, 172 (exclusion of paupers); *Thornton* v. *United States*, 271 U. S. 414, 425 (unrestrained ranging of cattle); *Caminetti* v. *United States*, 242 U. S. 470 (transportation of a woman for an immoral purpose but not for

son with the *Powell* decision, the Navy's transmission across the state line here is *a fortiori* in interstate commerce, since here the transmission was not of the munitions themselves, as was the situation in *Powell*, but rather of electric energy which was to be used not only in the production of munitions but also at the residence of employees engaged in such production.

The Company also argues that "so far as generation and transmission by Company are concerned, [the energy is] strictly California intrastate energy" (Br. in Opp., p. 4), but this overlooks the fact that the Federal Power Act regulates the "*sale* of electric energy at wholesale in interstate commerce" (Section 201 (b)) and that the Company is the seller in such an interstate sale. See cases cited *supra*, pp. 20–22. As the Ninth Circuit declared in dealing with this very issue (Appendix B, *infra*, p. 87):

> The transactions in question manifestly constitute sales by a public utility of electric energy in interstate commerce. It is of no moment that petitioner's facilities for the transmission and sale of the energy are all located in California and that those used to transmit it across the line into Nevada

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commercial vice); *Gooch* v. *United States*, 297 U. S. 124 (transportation of a kidnapped person); *Brooks* v. *United States*, 267 U. S. 432 (transportation of a stolen automobile); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 549.

> are owned by the purchasers of the energy. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83; *Federal Power Commission* v. *Arizona Edison Co.*, 9 Cir., 194 F 2d 679. Nor is it of consequence, as the petitioner contends, that in one instance the energy is transmitted across the state line by the United States. *Federal Power Commission* v. *Arizona Edison Co., supra,* p. 681. The question is not whether the United States is in interstate commerce, but whether petitioner is.

Nor is there any merit to the Company's contention (Br. in Opp., p. 6) that the sale is not in interstate commerce under the Power Act because of the provisions of Section 201 (f) of the Act, which provides insofar as here pertinent:

> No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of [the foregoing] * * *.

This provision exempts the United States and the states and their subdivisions from the regulatory burdens of the Act; it was not intended to limit the scope of the definitions contained in Part II or, for that matter, to deprive the United States of the rate benefits which might accrue from the regulation of the rates at which a public utility sells to it. In short, the exemption means, insofar as

here pertinent, only that the United States is not to be deemed a "public utility," subject to regulation by the Federal Commission under the Act. This provision was included so as to "remove all doubt that the act is not to apply to public projects, Federal, State or municipal," S. Rep. No. 621, 74th Cong., 1st Sess., pp. 19, 49; Hearings before Senate Interstate Commerce Committee on S. 1725, 74th Cong., 1st Sess., pp. 256–257.[8] Here, however, as we have already pointed out, *supra*, pp. 23–24, the Government is not engaging in the wholesale sale of the energy here involved, but rather is the purchaser, with the Company being the wholesale vendor. Neither the United States nor Mineral County are being sub-

[8] At the Senate hearings on the bill which subsequently become Part II, Mr. DeVane, then Solicitor of the Federal Commission and one of the draftsmen of the bill, testified (Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., pp. 256–257):

"Mr. DEVANE. We did not feel that it was within our province to prepare a bill that would undertake to regulate municipal, State, or Government utilities.

* * * * * *

"Insofar as all governmental projects are concerned, our approach to the matter was that in the legislation creating those authorities and giving those authorities their powers, this Congress had provided the power that it wanted those agencies to have, and it did not seem to us that it was proper to attempt to bring those other governmental agencies under the regulation of the Federal Power Commission; so that in our preparation of this bill we have left them out, and they are outside the pale of this bill.

"Senator BARKLEY. On the theory that it is not necessary for the Government to regulate itself?

"Mr. DEVANE. That is right."

jected to any "provision of this Part"; only the seller, which is not a governmental body, is being regulated. Consequently, since "it is clear that the intended exclusion or exemption is from the regulatory burdens of the statute" and "[t]he entire thrust of Part II is toward the seller at wholesale, not the buyer" (*California Electric Power Co.* v. *Federal Power Commission*, Appendix B, *infra*, p. 89), Section 201 (f) does not operate to remove these sales from federal regulation of the Act.

Section 201 (f) actually seems to buttress the contrary conclusion. For in that provision, Congress recognized that the United States could engage in the interstate activities which the terms of the Act subjected to regulation by the Federal Commission, and regarded the express exemption contained in Section 201 (f) as needed to show that the United States was not to be subject to regulation as a "public utility" under Part II of the Act. See S. Rep. No. 621, 74th Cong., 1st Sess., pp. 19, 49.

II

THE COMPANY'S SALES TO THE NAVY ARE SALES AT WHOLESALE SUBJECT TO REGULATION BY THE FEDERAL COMMISSION UNDER PART II OF THE POWER ACT AND NOT BY THE CALIFORNIA COMMISSION

Sections 205 and 206 of the Power Act provide for Federal regulation of the rates charged by any "public utility" for "the * * * sale of

electric energy subject to the jurisdiction of the Commission." Appendix A, *infra*, pp. 78–80. Section 201 (b) subjects to the Federal Commission's jurisdiction "* * * the sale of electric energy at wholesale in interstate commerce." Appendix A, *infra*, pp. 76–77. Section 201 (d) defines "sale * * * at wholesale" as "a sale * * * to any person for resale." Appendix A, *infra*, p. 77.

In the instant case, it is undisputed that the Company is a "public utility." Cf. *City of Los Angeles* v. *The Nevada-California Electric Corporation*,[3] 2 F. P. C. 104, 32 PUR(NS) 193. In addition, as we have just shown, the Company's sales to the Navy are in interstate commerce. And clearly the sales to the Navy are "at wholesale," *i. e.*, "for resale," within the ordinary meaning of those words.

But while conceding that "the Navy is in a sense 'reselling' energy purchased" from the Company (R. 15), the California Commission nevertheless concluded that the sales are not "at wholesale" within the meaning of Section 201. First, the California Commission held that the sale was not to a "person," within the meaning of Section 201 (d), because the definition of "person" contained in Section 3 did not specifically include the United States (R. 14). Secondly, it ruled that Congress intended to include in "sales for resale" only such sales to companies

[3] The name of the Company was changed from The Nevada-California Electric Corporation to its present name by amendment of its certificate of incorporation in 1941.

engaged in the public utility business and not sales where, as here, the resales are to the tenants of the reseller (R. 14–15). Finally, the California Commission was of the opinion that it had jurisdiction over the Company's sales by virtue of Section 20 of Part I; and consequently that "the provisos of Sections 201 (a) and 201 (b) in Part II operate to deny Federal Commission jurisdiction under Part II" (R. 15–16). Each of these grounds is without merit, as the Federal Commission had previously (R. 29–34) and the Ninth Circuit has subsequently held.

A. INTERSTATE WHOLESALE SALES TO THE UNITED STATES (OR TO MUNICIPALITIES) ARE NOT REMOVED FROM THE JURISDICTION OF THE FEDERAL COMMISSION BY REASON OF THE STATUTORY DEFINITIONS OF "PERSON" AND "CORPORATION".

The argument that sales at wholesale to the United States or a municipality do not constitute sales at wholesale within the meaning of the Federal Power Act rests upon the statutory definition of the words "person" and "corporation."

Section 201 (d) defines the sale of electric energy at wholesale to mean a sale "to any person for resale." Appendix A, *infra*, p. 77. Section 3 (4) contains the common definition of "person" as meaning "an individual or a corporation." Section 3 (3) defines corporation to mean "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing." Appendix A, *infra*, p. 74. It shall not

shall not include 'municipalities' as hereinafter defined." Appendix A, infra, p. 74.

Following these definitions literally, respondent argues, and the California Commission held, that neither the Navy nor Mineral County are "persons" within the meaning of the definition, and that therefore sales for resale to them are not sales at wholesale within the meaning of the Act.

Acceptance of this argument would mean that public utilities' sales of electric energy at wholesale to private utilities would be subject to federal regulation but not their sales for resale to municipalities operating their own distributing systems or to the Federal Government. The identical argument was presented to this Court in *Connecticut Light and Power Company* v. *Federal Power Commission*, 324 U. S. 515, where it seems to have been rejected *sub silentio*.[10] And

[10] One phase of the *Connecticut Light and Power* case involved sales "at wholesale to the Borough of Groton, which operated a municipal distribution plant," 324 U. S. at 520-521, and which resold a small portion of the energy received from the Power Company to a utility serving a nearby island in New York. In its brief the company advanced the same contention as to interstate sales to a municipality for resale not being subject to the Federal Commission's jurisdiction as was accepted by the California Commission and court in this case. See No. 189, October Term, 1944, Brief for Petitioner, pp. 54–57. The Federal Commission's brief also dealt with the point rather fully (pp. 48–53). Furthermore, the company argued that the volume of energy transmitted out of state after resale by the Borough of Groton was too insignificant to warrant the exercise of federal authority

it has also been rejected by three unanimous courts of appeals, the Ninth Circuit in the companion case to this one coming from the Federal Power Commission (see p. 8, *supra*), the Seventh Circuit in *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472, and the District of Columbia Circuit in *Wisconsin et al.* v. *Federal Power Commission*, and *Wisconsin Power and Light Co.* v. *Federal Power Commission*, Nos. 11224, 11225 (decided November 13, 1952). The decisions of the Seventh and Ninth Circuits are presently pending before this Court on petitions for certiorari, Nos. 291, 294, and 495. The decisions of the Ninth and District of Columbia Circuits which have not yet been reported, are set forth in Appendices B and C to this brief.[11]

(324 U. S. at 535–536). The Court's opinion reversing the Commission on other aspects of the case prescribed standards for it to follow. The Court specifically rejected the company's contention that the Commission's jurisdiction was "conditioned * * * upon any particular volume or proportion of interstate energy involved." (324 U. S. at 536), but did not see fit to mention the company's contention with respect to the point here under consideration. But in order to reach the question as to the significance of the small proportion of interstate energy, the Court was required to assume that the Federal Commission would have had jurisdiction over such interstate transactions. The Government's brief presented two alternative grounds in support of the Commission's jurisdiction, one of which was the identical argument advanced herein. Since the matter was treated *sub silentio*, there is no way of knowing to what extent, if at all, the Court relied on either ground.

[11] It is to be noted that the contrary decision of the Supreme Court of California in this case was reached by a 4–3 vote.

These decisions have properly interpreted the Federal Power Act, giving effect to its purpose, its language read in the light of familiar principles of statutory construction, and its legislative history.

1. The purpose of the Federal Power Act, as this Court has frequently noted (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 514–521; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 335–336), was to protect consumers against excessive electric rates resulting from the decisions denying to the states authority to regulate interstate wholesale transactions. This principle, as to the lack of state authority over interstate wholesale rates, extended to such sales when made to municipalities or to the United States for resale to consumers as much as when made to private utility companies. Certainly Congress would have had no reason for believing that the state from which power was transmitted across state lines possessed greater authority over the interstate rates when the wholesale customer was the Federal Government or a local governmental agency in another state. The number of sales for resale to such governmental bodies is substantial.[12]

[12] Out of the total number of 1,070 rate schedules on file with the Federal Power Commission on November 15, 1952, 213 were for sales by a private company to state agencies or municipalities and 23 for sales to federal agencies.

In so far as the United States is concerned, the effect of the California Commission's construction is to impute to Congress an intent to deny to the Federal Government—of which Congress is a part and whose financial interests are its direct concern—the federal protection which it has provided for non-governmental purchasers whose financial interests are of less immediate concern to it. In addition, this construction presumes a willingness by Congress to remit the financial interests of the Federal Government, but not those of the public generally, to the protection afforded by state regulation, however inadequate it might be—a result which would be anomalous even if the states had the authority to regulate the rate involved, as they did not have here. See also, *infra,* pp. 63–64.

The incongruity of the California Commission's conclusion is even more striking when applied to sales for resale to municipalities. In the words of the Seventh Circuit, with the subsequent concurrence of the Ninth and District of Columbia Circuits (197 F. 2d at 479): "To exempt municipal corporations would mean, as the Commission states in *Otter-Tail P. Co.,* 2 F. P. C. 134, 137, 33 PUR NS 257, 260, that 'a utility may not discriminate in rates charged private persons or corporations, but is at complete and unfettered liberty to indulge in the rankest discrimination as between municipalities, or as between private cus-

tomers and municipalities, receiving the same service.' We can not conceive that Congress intended to deprive consumers served by municipally owned distribution systems of the protection it was providing customers of other corporations against unjust and unreasonable rates. To construe the Act otherwise would fail to give effect to other provisions, such as Section 306, allowing municipalities to file complaints before the Commission on account 'of anything done or omitted to be done' in contravention of the Act and Section 313 (a), which authorized review of Commission orders at the behest of any aggrieved municipalities. We agree with the Commission's comment in *Otter Tail P. Co.* v. *F. P. C. supra,* at 138: 'Since the most serious, if not the only real complaint a municipality could have against a public utility would involve the rates charged it for electric energy at wholesale (the Commission has no power to regulate the retail rates of a public utility), it is most persuasive Congress intended that we have jurisdiction over such wholesale rates'."

In view of the manifest departure from the Congressional purpose if interstate rates in sales to the federal or local governments were not subjected to federal regulation, it would be appropriate here not "to wince at carrying out [the Act's] purpose because the words used do not formally quite match with it" (*Federal Deposit*

Insurance Corp. v. *Tremaine*, 133 F. 2d 827, 830 (C. A. 2)), even if it be assumed that literally the United States were excluded from "person" as defined in Section 3. For adherence to literal language would create incongruities and produce results "plainly at variance with the policy of the legislation as a whole" (*Ozawa* v. *United States*, 260 U. S. 178, 194), a result which, this Court frequently has held, justified following "that purpose, rather than the literal words" (*United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 543). See also, *Lawson* v. *Suwannee S. S. Co.*, 336 U. S. 198, 201, 206; *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 106; *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, 55; *United States* v. *Dickerson*, 310 U. S. 554, 562; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479; *Johansen* v. *United States*, 343 U. S. 427, 431; *Cabell* v. *Markham*, 148 F. 2d 737, 739 (C. A. 2), affirmed, 326 U. S. 404, 409; *Johnson* v. *United States*, 163 Fed. 30, 32 (C. A. 1).

2. It is of significance that all of the definitions with which we are dealing here are definitions of such general concepts as "person" and "corporation" which, we show below, appeared in the statute because of considerations having no relation at all to the present problem. The courts have recognized both in respect to the application of such general terms to government—state

or federal—and to the application of definitions to situations plainly not foreseen, that decision cannot rest on a mechanical application of definitions irrespective of all other considerations.

In *Lawson* v. *Suwannee S. S. Co.*, 336 U. S. 198, 201, the Court found it necessary to depart from a literal reading of a definition much more specialized in content than that involved here. As the Court there stated, "Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case. If we read the definition into § 8 (f) (1) in a mechanical fashion, we create obvious incongruities in the language, and we destroy one of the major purposes of the second injury provision." The Court's conclusion "that Congress would not have intended such a result" is much more appropriate here, where the problem is one as to which the intention of Congress is even more plain.

With respect to the application to government of general statutory provisions, it has been frequently recognized that all pertinent indicia of legislative intent must be given weight. Statutory provisions affecting "persons" have frequently been held not to include the United States where the consequences of a contrary reading would be to impose restrictions upon the Government, and Congress would not have so intended. See, *e. g.*, *United States* v. *Wittek*, 337 U. S. 346, 358–360; *United States* v. *United Mine Workers*,

330 U. S. 258, 272–276. In the *Wittek* case, this conclusion was reached even though literally the United States would have fallen within the statutory definition. See 337 U. S. at 359. On the other hand, "person" has been read to include the United States, where the result is to give it benefits being made available generally to private parties—also because that is what Congress would have intended. *Far Eastern Conference* v. *United States*, 342 U. S. 570, 576; *Stanley* v. *Schwalby*, 147 U. S. 508, 515; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *Ohio* v. *Helvering*, 292 U. S. 360, 370, and cases cited; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 91–93; *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C. A. D. C.).

In most of the cases cited there was no definition of "person" which would be controlling if read literally. But in *Ohio* v. *Helvering*, 292 U. S. 360, there was a definition of "person" which, read literally, would not have included the State of Ohio.[13] In holding that the tax applied to Ohio, the Court nevertheless applied the

[13] The taxes on liquor dealers were imposed on "every person" selling liquor (292 U. S. at 367). "Person" was defined by 26 U. S. C. (1926 ed.) 11 as follows:

"* * * where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

The Court did not refer to or rest its decision upon the introductory clause.

same principle as where "person" had not been defined (292 U. S. at 370): "Whether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found. Thus, in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, it is said that the word 'person' in the statute there under consideration would include the United States as a body politic and corporate."

Insofar as the United States is concerned, the statutory situation in the instant case is the same as in *Ohio* v. *Helvering*. There is the general reference to "person" in the phrase "sale of electric energy to any person for resale" in § 201 (d). The definition of "person" in § 3 (4) as an "individual or a corporation" and of "corporation" in § 3 (3) would not seem literally to include the United States, but does not specifically exclude it. This was equally true in the definition in *Ohio* v. *Helvering* insofar as its application to states was concerned. Just as in the *Wittek* case, where the definition literally would have included the Government as a "landlord" but the Court found the Government not to be subject to the statute, the ultimate criteria was the intention of Congress, not a general definition framed with other purposes in view.

It is thus fair to say that whether or not there is a general definition of "person" or "corporation," "there is no hard and fast rule of exclusion" (*United States* v. *Cooper Corp.*, 312 U. S.

600, 604–605); "[w]hether the word 'person' or 'corporation' includes a State or the United States depends upon its legislative environment" (*Georgia* v. *Evans*, 316 U. S. 159, 161), i. e., "the connection in which the word is found" (*Ohio* v. *Helvering, supra*, at 370). "The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law." *United States* v. *Cooper Corp.*, 312 U. S. at p. 605.

The verbal problem is more difficult as to sales to municipalities, since § 3 (3) specifically declares that the word "corporation" "shall not include 'municipalities' * * *." This provision was taken over without change from the definition of corporation in the 1920 Federal Water Power Act (41 Stat. 1064, § 3, paragraph 3). In 1920, of course, there was no Part II of the Federal Power Act, so that the sentence clearly was not meant to deprive municipalities of the benefits of the rate regulation provided for in the 1935 statute. The argument that the provision should not be construed as leaving interstate wholesale rates to municipalities without the protection of federal law rests on the other consi' rations discussed in this portion of this brief.

An additional caveat is necessary. We do not suggest that either the United States or munici-

palities are "persons" or "corporations" for all purposes under the Federal Power Act. Certainly the United States is not subject to affirmative regulatory control, and the same is true as to municipalities except where the statute is specific. See § 201 (f) and cf. §§ 4 (e) and 10 (e). Neither state nor federal governments were to be regarded as "persons" for purposes of requiring private utilities to make interconnections with them under § 202 (b). (*Federal Power Commission* v. *Idaho Power Co.*, No. 12, decided November 10, 1952.) Statements in Committee hearings indicate that the definitions of "persons" and "corporations," as well as § 201 (f), were thought to be means of achieving this end. See Senate Hearings on S. 1725, 74th Cong., 1st Sess., pp. 256–257; House Hearings on H. R. 5423, 74th Cong., 1st Sess., pp. 395–398. On the other hand, for purposes of the regulation of the rates charged where private utilities voluntarily undertake to render service to the federal or local governments as wholsale purchasers for resale (as in this case) and for purposes of judicial review (*Far Eastern Conference* v. *United States*, 342 U. S. 570, 576), we think it clear that the United States is to be regarded as a "person."

The conclusion to be drawn from this analysis is that insofar as the application of various provisions of the Act to federal and state governments is concerned, a mechanical reading of the definitions should not be the sole criterion, and that it

is appropriate here, as in other cases dealing with similar problems, to consider all other guides to Congressional intention.

3. The legislative history of § 201 (d) shows that the word "person" in the phrase "sale of electric energy to any person for resale" was not introduced into the definition of "wholesale sale" contained in Section 201 for the purpose of limiting the Commission's jurisdiction over wholesale sales, but merely as an incident to a rephrasing of the definition of "wholesale sale" to close an obvious loophole in another aspect of the earlier wording. The definition of "wholesale sale" in the bill (S. 2796, 74th Cong., 1st Sess.) as it passed the Senate and came to the House, did not contain the word "person" nor did it exempt sales for resale to the United States, to municipalities, or anyone else because of the purchaser's identity.[14] As a result of an amendment added without comment on the floor of the Senate (79 Cong. Rec. 8858), "wholesale sale" was defined to extend only to those situations where the energy was "sold for resale after

[14] S. 1725, 74th Cong., 1st Sess., as introduced in the Senate, and S. 2796, the substitute bill reported by the Senate Committee on Interstate Commerce, proposed that the Federal Commission have jurisdiction over "the sale of electric energy at wholesale in interstate commerce." Although at this stage there was no definition of "wholesale sale," the bills in effect defined the phrase by excluding "retail sale of such energy in local distribution."

its transmission in interstate commerce or before such transmission if the same is thereafter so transmitted." This omission of sales made *in the course of* transmission resulted in the proposed legislation's being inapplicable to the very type of sale involved in *Public Utilities Commission v. Attleboro Co.*, 273 U. S. 83. The House Committee corrected this defect by adopting the present broad definition of "wholesale sale" and in so doing, used the word "person" for the first time. The broad phrase sale "to any person for resale" was clearly not intended as a restrictive one. On the contrary, it seems plain that the intent was that "any person" means all purchasers at wholesale, the normal meaning of the sweeping phrase in the absence of a restrictive statutory definition. Significantly the Committee neither used the word "person" in describing the content of its proposal nor referred to the definitions contained in § 3. Indeed, the Committee stated without qualification that "a 'wholesale' transaction is defined to mean the sale of electric energy for resale * * *" (H. Rep. No. 1318, 74th Cong., 1st Sess., p. 8). Far from indicating a restrictive view of the Federal Commission's jurisdiction, this makes clear that the Committee intended that the Federal Commission should regulate all interstate sales for resale regardless of who the purchaser for resale may

be.[15] Since there was no subsequent discussion of the change suggested by the Committee, which was accepted by the Conference Committee without comment, H. Rep. No. 1903, 74th Cong., 1st Sess., the Committee's remarks are the only clue to what Congress meant.

In addition, the report nowhere manifested a purpose to exempt any sales for resale, let alone such sales to the United States or municipalities. This is particularly significant, for the report plainly indicated when an exemption was intended. Thus, immediately following the first restatement of the definition of wholesale sales, the report added "and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce." H. Rep. No. 1318, 74th Cong., 1st Sess., p. 8. Had the Committee intended also to exempt sales for resale to governmental bodies, it would have pointed that out. These considerations, plus the further one that the House definition was intended generally to broaden the Senate definition which it superseded, strongly suggest that "person" in Section 201 (d) was not used in the artificially restricted meaning of Section 3.

[15] While the Committee elsewhere described a wholesale sale as a "sale to any person for resale" (*id.*, at p. 27), there again "person" was not emphasized, nor was there any indication, such as quotation marks, that "person" was used in the limited meaning of Section 3, rather than in an all-inclusive sense.

The history of Section 3, which contains the restrictive definitions of "person" and "corporation," likewise indicates that there was no Congressional purpose thereby to exempt sales for resale to the United States and other governmental bodies. The definition of "person" was added by the original draft of the 1935 amendments along with definitions of certain other terms. It, therefore, could not have been intended originally to affect the meaning of "wholesale sale" for, as we have shown, *supra*, pp. 40–42, it was not until later that the word "person" was introduced into the definition of that phrase. Moreover, it is noteworthy that the House Committee's comments on Section 3, which were made after "person" was added to the definition of sale at wholesale, not only does not refer to any additional impact of the definition of "person" (see *supra*, pp. 41–42), but in effect adopts the very general comments of the Senate Committee made prior to the inclusion of "person" in the wholesale sale definition. Compare H. Rep. No. 1318, 74th Cong, 1st Sess., p. 22, with S. Rep. No. 621, 74th Cong., 1st Sess, p. 42.[16]

[16] The Senate Report states merely:
"The terms 'person', 'licensee', 'Commission', 'Commissioner', 'State commissions', and 'security' are defined for the first time. Their usefulness in the drafting of later provisions is obvious."

The House Report notes that Section 3 "adds new definitions of 'person', 'licensee', 'commission', 'commissioner', 'State commission' and 'security', all of which are of assistance in drafting the rest of the title."

When, accordingly, there is borne "in mind the gradual development of the various provisions of the Act" (*Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 197 F. 2d 472, 479 (C. A. 7)), it seems only proper to conclude that when the definition of "sale at wholesale" in Section 201 (d) was rewritten in the House, the word "person" was used therein without intention by the draftsmen that the artificially restricted meaning given to the word in Section 3 be carried over to Section 201 (d).

Finally, the Federal Commission, the agency primarily charged with the administration of the Power Act, has consistently read Section 201 (d) not to exclude sales for resale to governmental bodies, such as the United States and municipalities. This "executive interpretation" is an additional aid to construction, indicating that the United States was not excluded from "person" as used in Section 201 (d). Cf. *United States* v. *Cooper Corp.*, quoted *supra*, p. 38. In all cases in which this question has been raised, the Federal Commission has construed Section 201 (d) not to exempt from its jurisdiction any sales for resale in interstate commerce. *Otter-Tail Power Company*, 2 F. P. C. 134, 136–140, 33 PUR(NS) 257, 259–269; *Connecticut Light & Power Company*, 3 F. P. C. 132, 144, 44 PUR(NS) 170, 181, affirmed, 141 F. 2d 14 (C. A. D. C.), reversed on other grounds, 324 U. S. 515; *Otter-Tail*

Power Company, 8 F. P. C. 393; *Wisconsin Power & Light Company*, F. P. C. Opinion No. 215, issued July 12, 1951, affirmed *sub nom. Wisconsin Power & Light Co.* v. *Federal Power Commission*, C. A. D. C. Nos. 11224, 11225 (decided November 13, 1952, Appendix C, *infra*, p. 92); see, also, *City of Los Angeles* v. *The Nevada-California Electric Corp.*, 2 F. P. C. 104, 32 PUR (NS) 193. This consistent interpretation by the responisble administrative agency is, under well-established principles, entitled to great weight. See *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549.[17]

Our view on this point may be summarized in the language of the Seventh Circuit in the *Wisconsin-Michigan* case, 197 F. 2d at 479:

> After consideration of the legislative history of the respective provisions of the Act, we think the apparent inconsistency was an oversight and that Congress never intended to exclude from its definition of sales for resale, sales to municipalities for resale. When we bear in mind the gradual development of the various provisions of

[17] The Company's suggestion that the California Commission's ruling is supported by Section 201 (f) (Br. in Opp., p. 13) overlooks the distinction already pointed out (*supra*, pp. 24–26), that in so far as here pertinent, Section 201 (f) was intended to relieve the United States from regulation as a public utility when it engaged in sales for resale, but not to relieve from federal regulation the public utility making such sales for resale to the United States.

> the Act and the policy of the statute as a whole, we think that the "slip" was inadvertent and that we must so interpret the Act as to make effective its over-all purpose, despite the literal words of Part I. *United States* v. *American Trucking Ass'n,* 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345; *United States* v. *Rosenblum Truck Lines,* 315 U. S. 50, 62 S. Ct. 445, 86 L. Ed. 671. In doing so we look also to the continued construction of the Act by the Commission,—the agency charged with its administration. *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796; *United States* v. *American Trucking Assn.,* supra. The report of the Congressional Committee recommended no exemption of wholesales to municipalities, yet where an exemption was intended, the report so stated, House Rep. No. 1318, 74th Cong., 1st Sess., p. 8. The House definition of wholesaler was obviously intended to broaden the Senate definition which it supplanted. All this reflects, we think, an intent not so to limit the word "person" as to exclude any one selling electric energy for resale.

This reasoning was accepted by both the Ninth and District of Columbia Circuits without elaboration, the former stating succinctly (Appendix B, *infra,* p. 88):

> that reference back to the early definitions contained in Part I should not be permitted to thwart the general policy manifested by the statute as a whole. It seems

more than probable that the significance of those definitions was overlooked in the later formulation of Part II.

B. THE FEDERAL POWER COMMISSION HAS JURISDICTION TO REGULATE INTERSTATE WHOLESALE SALES REGARDLESS OF THE NATURE OF THE RESELLER

There is no substance to the California Commission's further conclusion that "sale for resale" as used in Section 201 (d) was intended to be limited to such sales when made to companies in the public utility business and consequently not to include such sales where, as here, the resale is to the tenants of the reseller.

Calfornia's argument recognizes that "[t]he courts have repeatedly pointed out that Part II was enacted to close the gap in utility regulation revealed by the *Attleboro* decision" [*Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83] (R. 15). But the California Commission asserts that since the *Attleboro* case—and others—involves sales to privately owned utilities for resale and not to governmental units, the federal statute cannot apply to the latter, even though the California Commission does not deny that the Navy is "in a sense 'reselling' energy purchased from" the Power Company (R. 15). The assumption upon which the argument rests is that because the cases denying the States power to regulated wholesale interstate rates had involved sales to private utilities companies, the area in which the States could not act was similarly limited—and that therefore

the Federal Power Act only reaches interstate wholesale rates to such utilities.

Nothing in the *Attleboro* case supports the suggested distinction. The opinion differentiates between wholesale interstate rates which it regarded as "essentially national in character" and retail rates which it thought to be local, and therefore subject to state regulation (273 U. S. at 87–90). This, of course, would be true to the same extent whether the purchaser was a private company or a governmental agency. Certainly the fact that the purchaser was the United States Navy would not make the transaction less "national in character." Furthermore, nothing in the *Attleboro* opinion gives the slightest weight to the fact that the purchaser was a private corporation rather than a public body.

The *Attleboro* case has never been described by Congress, when it enacted the Federal Power Act, or by this Court, as limiting the denial of State power to sales to private companies. In *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 67–8, the gap which *Attleboro* created and the Federal Power Act filled was broadly described in language inclusive of all interstate sales as follows:

> The primary purpose of Title II, Part II, of the 1935 amendments to the Federal Power Act, *supra* note 1, was to give a federal agency power to regulate the sale of electric energy across state lines. Regu-

> lation of such sales had been denied to the states by *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83. * * *

In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 515, the Court summarized the prior law in this way:

> * * * sales for resale, *usually* to local distributing companies, were beyond the reach of state power, regardless of the character of ultimate use. This fact not only prevented the states from regulating those sales but also seriously handicapped them in making effective regulation of sales within their authority. [Italics supplied.]

Nothing in the language or history of the 1935 Act even remotely implies that Congress viewed the *Attleboro* gap as narrowly as California's argument would require. The language of the statute contains no special restrictive provision. (We have already shown (*supra*, pp. 28–47) that the definitions in Sections 201 (d) and 3 (3) and (4) were not meant to embody any such limitation.) The statutory language is "sale of electric energy to any person for resale." The Committee Reports contain broad statements indicating that Congress was not aware of any limitation upon the States' inability to regulate interstate wholesale rates. The House Report declares in sweeping terms (H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7–8):

> * * * Under the decision of the Supreme Court of the United States in *Public Utilities Commission* v. *Attleboro Steam & E. Co.* (273 U. S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates. A "wholesale" transaction is defined to mean the sale of electric energy for resale, and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce.

See also S. Rep. 621, 74th Cong., 1st Sess., p. 48. The explanations of the proponents and draftsmen of the bill before the Committees and on the floor of Congress likewise reveal the same intent. See Hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5423, 74th Cong., 1st Sess., pp. 421, 422, 497–498, 523; Hearings, Senate Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st Sess., p. 760; 79 Cong. Rec. 10377. See also Hearings on H. R. 5423, *id.*, pp. 384, 402, 435, 522; Hearings on S. 1725 *id.*, pp. 250, 800–803. Congress thus plainly intended to adopt the wholesale-retail distinction delineated in the *Attleboro* case,[18] and to confer authority over all wholesale sales, regardless of the identity of the reseller, upon the Federal Commission.

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[18] See, also, *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23.

All of these general statements show that the *Attleboro* doctrine was thought applicable to all interstate wholesale transactions—without any intimation in favor of the limitation for which California contends based upon the identity of the purchaser for resale.

C. THE CALIFORNIA COMMISSION DOES NOT GAIN NOR THE FEDERAL POWER COMMISSION LOSE JURISDICTION BECAUSE THE CALIFORNIA COMPANY IS LICENSED TO OPERATE HYDROELECTRIC POWER PROJECTS UNDER PART I OF THE FEDERAL POWER ACT. ON THE CONTRARY, SINCE THE REQUISITES FOR STATE ACTION UNDER SECTION 20 OF PART I HAVE NOT BEEN MET, SECTION 20 IS AN INDEPENDENT BASIS FOR THE EXERCISE OF AUTHORITY BY THE FEDERAL POWER COMMISSION

Respondents have also contended and the California Commission held (prior to this Court's decision in *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, 343 U. S. 414) that because the California Company generates power at hydroelectric plants licensed under Part I of the Federal Power Act, its rates are subject to regulation by California under Section 20 of Part I, and, accordingly, not by the Federal Commission under Part II. The identical argument was rejected by this Court in the *Penn Water* case at the last Term (as well as by the Court of Appeals in *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957). The California Commission's brief in opposition herein (p. 14) concedes this, but denies that it based its de-

cision on the ground stated. The denial does not seem accurately to reflect the reasoning of the California Commission's opinion (R. 15–16). But in any event the brief in opposition a page later (pp. 15–16) reasserts the argument which it says that Commision never made. The Company makes the same contention (Br. in Opp., pp. 15–17).

What the California Commission calls the "actual ground" for its decision (Br. in Opp. p. 15) is the multifold argument that (1) California but not Nevada has authority over the sales to the Navy and that therefore the case does not fall within the *Attleboro* gap in state power, (2) under Section 20 California is authorized to regulate the sales to the Navy, and (3) because of these two "facts," Section 201 of Part II operates to deny the Federal Commission authority. Since the last point seems in part to be the very one the California Commission denies making, it seems best to answer it, as well as the other two contentions.

We have already shown that the *Attleboro* doctrine barring state regulation of interstate wholesale rates related to all such rates—and that Congress so regarded it when the Federal Power Act was passed (see pp. 48–51, *supra*). We shall now deal with the contention still advanced by the Company (and by the California Commission on page 16 but not on page 14 of its brief in opposition) that Part II does not give

the Federal Commission jurisdiction over sales which states may regulate under Section 20 of Part I. We shall also argue that in any event, California has not satisfied the requisites of Section 20 of Part I and was, therefore, not authorized to act by that Section. If we are right as to the latter point, the Federal Commission has jurisdiction over the sales in question under Section 20 of Part I, independently of Part II, just as in the *Penn Water* case. The Commission so held (R. 29–31).

1. In *Penn Water* (343 U. S. 414) the company urged, as the California Commission ruled here, that the provisions of Part II are inapplicable to sales which are subject to potential state regulation under Section 20 of Part I, since Section 201 (a), Appendix A, *infra*, p. 76, declares that federal regulation shall "extend only to those matters which are not subject to regulation by the States." See Brief for Petitioners in No. 428, October Term, 1951, pp. 76–83, particularly p. 77. This Court, however, refused to adopt this construction of Part II, saying (343 U. S. at 418–419):

> * * * the language of Part II of the Act makes all "public utilities" subject to the regulation it prescribes. No reason has been advanced which could possibly justify a judicial exception to this statutory command. A major purpose of the whole Act is to protect power consumers against excessive prices. Part I leaves

> regulation to the states under some circumstances. But, under § 20 of Part I the Federal Government is to protect the consumer if a state regulatory body does not exist or the "States are unable to agree * * * on the services to be rendered or on the rates or charges of payment therefor * * *." Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which must be accomplished by the Federal Government. *Part II therefore provides for a more expansive federal regulation than that authorized under Part I. It would hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation.* [Italics supplied.]

The *Penn Water* decision clearly demonstrates that the California Commission improperly treated the Power Commission's jurisdiction under Part II as limited by Part I, as the Ninth Circuit has held in the companion case (*California Electric Power Co.* v. *Federal Power Commission* (C. A. 9), Appendix B, *infra*, pp. 86–87). Since Congress has given the Federal Power Commission authority in Part II to regulate all interstate wholesale sales, the California Commission was not empowered to regulate the same transactions.

Respondent company argues that the *Penn Water* case is distinguishable because there the state commissions were unable to agree, as re-

quired under Section 20 if the Federal Commission was not to exercise jurisdiction (Br. in Opp., p. 16). But that was merely an alternative basis for this Court's decision. See 343 U. S. at p. 419. That does not make the main ground of decision less authoritative or persuasive. (We have not thought it necessary to repeat the full length argument on this point contained in our brief (pp. 124–137) in the *Penn Water* case.)

2. Even if it be assumed, contrary to the foregoing, that the Federal Commission does not have jurisdiction over these sales under Part II of the Federal Power Act, the California Commission erred in holding that Section 20 of Part I vested it with jurisdiction over the Company's sales to the Navy.[19] Section 20 authorizes the Federal Commission to regulate the rates charged by a licensee under Part I of the Act for electric energy sold in interstate commerce "whenever any of the

[19] While Section 20 is not expressly limited to retail sales in interstate commerce, we urge, if the question should be reached in the present case, that Section 20 does not extend to interstate sales for resale and, if this reading be incorrect, that Section 20 is *pro tanto* repealed by implication by Part II of the Act. See Brief for Federal Power Commission in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, Nos. 428, 429, October Term, 1951, pp. 124–129, 135–137. This Court did not find it necessary to reach these questions in the *Penn Water* case.

The Company's claim that Section 19, rather than Section 20, is applicable (R. 61–62), fails to recognize the exceptions carved out of Section 19, by Section 20, for interstate sales.

States directly concerned has not provided a commission or other authority to enforce [the Section's requirements] * * * within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates and charges of payment therefor, * * *." Far from supporting the California Commission's position, this Section places authority over the sales in this case in the Federal Commission.

(a) Although Section 20 permits regulation jointly by the "States directly concerned" of the interstate rates charged by licensees under Part I,[20] the California Commission ruled that Nevada, the State into which the energy was transmitted from California, and whose residents are the ultimate consumers, was not "directly concerned." According to the California Commission, this result flowed from the fact that *"no state can have jurisdiction over the Navy, an arm of the federal government.* Nevada has no jurisdiction over the rates the Navy pays to [the Company] nor over the rates the Navy charges its personnel and tenants" (italics in original) (R. 11, see also R. 13). Consequently, the California Commission held, Cali-

[20] Section 20, by stipulating inability to agree among the state agencies as the condition precedent to regulation by the Federal Commission, made plain that the state regulation intended was regulation by the states directly concerned as equals, not by one assuming the prerogative of regulation, and the other the role of petitioners or protestants, as has been urged by the Company and the California Commission.

rnia alone was "directly concerned" and its actions satisfied the conditions of Section 20 inasmuch as it was a "properly constituted authority" within that Section. The Federal Commission had ruled to the contrary, finding (R. 39) "The 'States directly concerned' within the meaning of Section 20 are the States of California and Nevada."

The California Commission's conclusion fails to recognize that the provisions of Section 20 apply, if at all, to the rates charged by the Company to the Navy, and not to the rates charged by the Navy to its tenants. And as to the Company's sale to the Navy, the doctrine of intergovernmental immunity may not be applicable. Compare *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U S. 285, with *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* 318 U. S. 261. Moreover, even if the doctrine of intergovernmental immunity were applicable, it would no more preclude regulation of the Company's sale to the Navy by Nevada than it would regulation of that sale by California. As far as that doctrine is concerned, the states' authority to regulate, if they have any, is equal. Intergovernmental immunity operates with an even hand on both California and Nevada. Indeed, if the doctrine of intergovernmental immunity is applicable, California, as well as Nevada, would be without any authority over the sale.

But passing intergovernmental immunity, it becomes clear that the Company's sale to the

Navy is of concern to Nevada as well as to California. The ultimate consumers live in Nevada. The Company makes other sales of electric energy in Nevada (R. 7, *supra*, p. 3), and the costs of furnishing energy to the Navy and the revenue derived therefrom concern Nevada, since they are part of the Company's over-all costs and revenues which, of course, affect the rates charged to the other Nevada consumers. See *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 334; cf. *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23. Indeed, in these circumstances, Nevada's concern would be greater than that of California, if the latter's sole interest were, as asserted by the California Commission (R. 11), its control over the Company. Cf. *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 184, fn. 2; *Pennsylvania* v. *West Virginia*, 262 U. S. 553. Since it is plain that Nevada's concern with the sale is at least equal to that of California, whatever jurisdiction California might have over the sales by virtue of Section 20 is shared with Nevada and could not be exercised, as attempted here, by the California Commission acting alone.

(b) Clearly therefore, Nevada as well as California was a state concerned. Accordingly, California can exercise no jurisdiction under Section 20 unless the conditions prescribed in that section for state action are satisfied. Those conditions are that both states concerned shall have provided a Commission authorized to agree on the rate in-

volved, and that the states are able to agree. Neither of these conditions has been fulfilled.

Irrespective of whether California has provided in its Commission, "a commission or other authority to enforce the [Section's] requirements * * * within such State," Nevada has not provided any such Commission or other authority. This is clear from a mere reading of the statutes defining the jurisdiction of the Public Service Commission of Nevada. Thus, while Section 6147 of the Nevada Compiled Laws (1929) authorizes public utilities to purchase electricity from other suppliers and Section 6148 subjects the purchase contracts to the Nevada Commission's approval, Section 6149 expressly provides that in no circumstances shall the seller be deemed to be a public utility or subject to the jurisdiction of the Nevada Commission.[21]

[21] Section 6149 provides:

"SELLER NOT DEEMED A PUBLIC UTILITY.—FAITH OF STATE PLEDGED. The person or corporation selling such water or electric current to such public utility under such contract approved by the public service commission shall not thereby become, or be deemed to be, a public utility within the meaning of any statute of this state, nor shall it by virtue of such contract be deemed to be within or subject to the jurisdiction of the public service commission of Nevada in any respect whatsoever, nor shall it thereby be deemed to be in any sense a public service corporation, or engaged in a public service. The terms and provisions of this act shall be taken and considered to be a part of any such contract, and the faith of the State of Nevada is hereby pledged against any alteration, amendment or repeal of this act during the existence of any such contract, or any extension thereof, approved by the public service commission of Nevada."

in the face of such objections, have the objections been sustained by the courts, and the courts' opinions which have noticed the objections have expressly overruled them. See *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 66–67, affirming 129 F. 2d 183, 186–189 (C. A. 3); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 535–536; *Pennsylvania Water & Power Corp.* v. *Federal Power Commission*, 343 U. S. 414, 419–420, affirming 193 F. 2d 230, 240–241 (C. A. D. C.); *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 958 (C. A. 2), certiorari denied, 319 U. S. 741. This unvaried line of decisions is consistent with this Court's earlier decisions denying to the states jurisdiction over the sales of mixtures.[30]

In the *Connecticut Light & Power* case, the Commission held that the company had been a

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Power Corporation, 5 F. P. C. 221, 235, 66 PUR (NS) 212, affirmed, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957; *Pennsylvania Water & Power Company*, 8 F. P. C. 1, 12–17, 82 PUR (NS) 193, affirmed, 193 F. 2d 230 (C. A. D. C.), affirmed, 343 U. S. 414; *Florida Public Utilities Company*, Opinion No. 189, issued January 25, 1950, pp. 11–15 (Mimeo.); *Arizona Edison Company, Inc.*, 84 PUR (NS) 3, affirmed, 194 F. 2d 679 (C. A. 9); *Western Light and Telephone Company, Inc.*, Opinion No. 199, issued September 20, 1950, pp. 1–3 (mimeo.), 87 PUR (NS) 311; *Wisconsin-Michigan Power Company*, 89 PUR (NS) 97, affirmed, 197 F. 2d 472 (C. A. 7).

[30] *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298; cf. *Public Utilities Commission* v. *Landon*, 249 U. S. 236. While those sales, both made in Kansas, consisted principally of gas pro-

"public utility" on the basis, in part, of a 14-mile transmission line in Connecticut, from which it sold electric energy, a part of which was transmitted and resold in New York by the purchaser for local distribution and consumption. While this Court set aside the Federal Commission's order on other grounds, it rejected the petitioning company's objection based on the relatively small amount of interstate energy involved as compared to the company's total system energy, saying (324 U. S. at pp. 535–536):

> * * * It is contended that the volume of energy passing over certain of these facilities is insignificant in proportion to the total. Only about one-fifth of one per cent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state during the time of the connection of Fishers Island with the Borough of Groton. Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. * * * The wisdom of its work is not our concern, but only its legal justification. We do not find that Congress has conditioned the jurisdiction of the Commission upon any particular volume or proportion of interstate en-

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duced out-of-state, Kansas-produced gas constituted 6% at the time of the *Laydon case* (249 U. S. at p. 242) and 34% at the time of the *Missouri* case (No. 133, October Term, 1925, Record, p. 13).

ergy involved, and we do not think it would be appropriate to supply such a jurisdiction limitation by construction.

And in the *Penn Water* case, the company similarly claimed that since 83% of the energy delivered to its three Pennsylvania customers originated in Pennsylvania, and only 17% of that energy was generated in Maryland, the sale of the total was subject to state, rather than federal, regulation. This Court held that the Federal Commission "has complete authority to regulate all of the commingled power flow." (343 U. S. at 420.)

The principles of these cases, particularly of *Penn Water,* are fully applicable here. As stated by the Ninth Circuit in dealing with this very question in *California Electric Power Co.* v. *Federal Power Commission,* Appendix B, *infra,* p. 91:

> Here, as in the *Penn Water* case, the supposed nonjurisdictional part of the energy is indistinguishable at the point of sale from the remainder. Moreover, the amount resold is not constant, but fluctuating. The [Federal] Commission contends that it is not practicable to segregate the jurisdictional from the alleged nonjurisdictional part. It seems clear, although [the Company] contends otherwise, that the only mode of segregation would be by separating the two loads and supplying each by an independent transmission line

from the point of metering and purchase to the Depot.

In virtually all sales of power to a public body, such as a municipality, we would suppose that some part of the energy is used by the purchaser for its own purposes, the rest being resold to the consuming public. It would create untold difficulty and confusion if petitioner's argument in respect of severability for rate regulation purposes were to be given countenance.

4. The sales are not within the exemption from federal regulation contained in section 201 (b) for "facilities used in local distribution."— Finally, the Company has suggested that since the sale to the Navy is made off a 55,000 volt line, which is also tapped to supply energy to a number of local communities which the Company serves at retail, the line is used in local distribution, and the sales to the Navy are within the exception contained in Section 201 (b) for "facilities used in local distribution."

It is clear, however, that supplying energy to these communities must involve tap lines from the 55,000 volt line and transformers to step down the voltage to a level usable in distribution to the private customers, since the power cannot be distributed directly into private homes at the very high long-distance transmission level of 55,000 volts. In *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, this Court

held, on similar facts, that East Ohio's pipelines were not used in local distribution, saying (338 U. S. at 469–470):

> But what Congress must have meant by "facilities" for "local distribution" was equipment for distributing gas among consumers within a particular local community, not the high-pressure pipe lines transporting the gas to the local mains.

The 55,000 volt line here involved plainly does not fall within this definition of "facilities used in local distribution."

Moreover, even if the facilities from which the sales were made were used in local distribution, it does not follow that the sales themselves would be within the exemption. For, as the Commission pointed out in *Wisconsin-Michigan Power Company*, affirmed, 197 F. 2d 472 (C. A. 9), petitions for certiorari pending, Nos. 291, 294, "nothing in the act makes our jurisdiction under Part II over sales of electric energy dependent upon the nature of the facilities involved in effecting the sale. * * * Under the statute the nature of facilities only applies to the determination of the status of an electric company as a 'public utility' under Part II." Thus, the Company's position is based on the fallacious assumption that the Federal Commission's jurisdiction over sales depends on the nature of the facilities from which the sales are made, whereas in fact the converse is true and

the character of the sales determines the status of the facilities from which they are made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Supreme Court of the State of California, affirming the order of the California Commission, should be reversed.

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DECEMBER 1952.

Finally and particularly significant, is the fact that the Nevada Commission has no authority to agree with the California Commission or other authority of California on a jointly-determined rate for the Company's sales to the Navy. Since Section 20 contemplates that the state commission or other authority has power so to agree in order to enforce the Section's provisions, Nevada obviously has not provided the type of commission contemplated by the statute, and this failure operates by the terms of the Section, to place jurisdiction over the sales in the Federal Commission.

Reading Section 20 as requiring a state authority to have at least such power is neither "bizarre" nor "strange and unheard of," as suggested by the Company and the California Commission. Both the Pennsylvania and Maryland Commissions involved in *Pennsylvania Water & Power Corp.* v. *Federal Power Commission,* 343 U. S. 414 (see also, *Safe Harbor Water Power Corp.* v. *Federal Power Commission,* 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957), had expressly been given such power by the respective state statutes.[22] Significantly, the only court cases prior to this one in which licensees have claimed

[22] Pennsylvania Public Utility Law, Section 913 (a), reads as follows:

"The commission shall have full power and authority to make joint investigations, hold joint hearings within or without the Commonwealth, and issue joint or concurrent orders in conjunction or concurrence with any official, board, com-

that state commissions had jurisdiction under Section 20 have come from those two states.[23] There thus can be no question that the Nevada Commission is not constituted with any responsibility or power of any kind as to regulation of the Company's rate to the Navy or Mineral County. The Chairman clearly so indicated in the joint hearing before the two Commissions,[24] Company counsel voluntarily so stipulated at the hearing,[25] and the Company points to nothing in the record or in the Nevada Constitution, statutes or decisions as

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mission, or agency of any state or of the United States, whether in the holding of such investigations or hearings, or in the making of such orders, the commission shall function under agreements or compacts between states or under the concurrent power of states to regulate the interstate commerce, or as an agency of the Federal Government, or otherwise."

Maryland Public Service Commission Law, Section 348, reads as follows:

"The Commission shall have full power and authority to make joint investigations, hold joint hearings, and issue joint or concurrent orders in conjunction or concurrence with any official board or commission of any state or of the United States, whether in the holding of such investigations or hearings or in the making of such orders the Commission shall function under agreements or compacts between states, or under the concurrent power of states to regulate interstate commerce, or as an agency of the Federal Government, or otherwise."

[23] *Safe Harbor W. P. Corp* v. *Federal Power Commission*, 124 F. 2d 800 (C. A. 3), certiorari denied, 316 U. S. 663. *Safe Harbor W. P. Corp.* v. *Federal Power Commission*, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957; *Penn W. & P. Co.* v. *Federal Power Commission*, 343 U. S. 414.

[24] No. 495, this Term, Tr. of Record, p. 153.

[25] *Id.* at 245-246.

showing the contrary. The Federal Commission was, therefore, abundantly warranted in finding as it did in its opinion (R. 31):

> It is apparent that the Public Service Commission of Nevada is without authority, with respect to rates charged Mineral County or the Navy, and therefore cannot be regarded as a "commission or other authority to enforce the requirements of" Section 20, and it follows that no further showing is required to support the conclusion that it is *impossible for a properly constituted authority of Nevada to agree with the California Commission* concerning the rates charged Mineral County and the Navy.

Finally, since no Nevada authority has in fact agreed to California's rates (Mineral County has disagreed), the rates would be ineffective under Section 20 even if some Nevada agency could lawfully have agreed.

D. OTHER CONTENTIONS ADVANCED BY THE COMPANY ARE INSUBSTANTIAL

In addition to the grounds relied upon by the California Commission, the Company has advanced other arguments in attacking the jurisdiction of the Federal Commission in the proceeding before the Ninth Circuit (see Appendix B, *infra*, p. 83). These contentions, we shall show, have no merit.

1. *The sales to the Navy are sales for resale despite the inability of Nevada to regulate rates at which the Navy resells to its tenants.*—The

Company's argument that the purpose of Part II was limited to enabling "State agencies to start with a fair wholesale rate in regulating the local distribution rate" and that Part II should, accordingly, be held inapplicable because the Navy's local distribution rate is not regulated by a state agency, is not supported by any citation of authority. Obviously the Company has cut its coat to fit its cloth. The contention is in conflict with the Federal Commission's consistent interpretation of the rate regulatory provisions as being intended for the benefit of consumers, including those served by municipal distributing utilities, which are usually not regulated by state agencies. It also ignores the fact that at the time of the enactment of Part II in 1935, even privately owned local distributing utilities' rates were not subject to regulation by state agencies in seven states,[26] yet it would scarcely be contended that there were not "wholesale sales" subject to the Federal Commission jurisdiction in those seven states.

Finally, the Company's argument overlooks the significant fact that here, unlike the case of a wholesale sale to a private distributing company, the energy purchased from the Company is paid for by the Navy out of public funds. Accordingly, while the public interest is concerned with the wholesale rate to the private distributing company primarily because of its effect upon the rate charged the ultimate consumers, the public interest is involved in the Company's rate to the

[26] House Hearings, H. R. 5423, 74th Cong., 1st Sess., p. 496.

Navy, regardless of the resale rate charged by the Navy, since once the rate charged by the Company is paid, the burden, if the rate be excessive, inevitably falls either on the ultimate consumers of the energy or on the nation's taxpayers. See *California Electric Power Co.* v. *Federal Power Commission*, Appendix B, *infra*, p. 90.

2. *A contract provision for resale is unnecessary to constitute the sales to the Navy "sales for resale."*—The Company has further urged that because the contract between it and the Navy does not specifically provide for resale, but merely that the energy was sold "for the use of the Government's Naval Ammunition Depot, Hawthorne, Nevada," the transaction cannot be a "sale for resale" within the meaning of Section 201 (d). See, *e. g.*, R. 59–60. As has been pointed out, the Navy's resales were to its employees residing at the Depot and to the concessionaires providing services at the Depot for these tenant employees.

We think it immaterial whether or not the resales are authorized under the contract—although until this litigation, the Company seems never to have made any objection to the Navy's use of the power. There is no doubt—and the Company does not deny—that it knew of these resales.[27] It is sufficient, we submit, for the purposes of

[27] The Federal Commission found (R. 32):

"As previously shown, the undisputed fact is that the energy is in part resold by Navy *with Respondent's knowledge*, at 1.5¢ per kwh to business concessions and residents occupying the Navy's housing project." [Italics added.]

Section 201 (b) and (d) that the original seller know that the energy is being resold. There is nothing in Sections 201 (b) and (d) which makes the Federal Commission's jurisdiction under Part II dependent upon the terms used in contractual agreements. It is, of course, obvious that contracts can be phrased to conform to the whims or objectives of either party rather than the facts as they exist. Indeed, the contrary conclusion urged by the Company would place the seller in the position of being able to avoid the burdens of federal regulation, while engaging in the very activities which Part II was designed to regulate. Plainly, therefore, "an express agreement or an intention on the Company's part that the energy shall be resold is [not] required in order to confer jurisdiction." *California Electric Power Company* v. *Federal Power Commission*, Appendix B, *infra*, p. 89. In these circumstances, since the Company, in delivering the energy to the Navy, was fully aware that the Navy was reselling it to its tenants and concessionaires, the sales to the Navy were clearly "made with a view to the * * * resale" (*Kalem Co.* v. *Harper Bros.*, 222 U. S. 55, 62; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225) and as such, were subject to federal regulation under Part II. *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 958–960 (C. A. 2), certiorari denied, 319 U. S. 741; cf. *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324

U. S. 515.[28] In *Jersey Central Co.* v. *Federal Power Comm.*, 319 U. S. 61, 69, this Court answered a contention by a selling company that the buyer's transmission of part of the energy out of the state was beyond the seller's control and that hence the seller's own transmission was not "in interstate commerce" because not voluntary or intentional, saying:

> In *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83, 86, this Court held in interstate commerce the sale of locally produced electric current at the state boundary with knowledge that the buyer would utilize the energy extrastate. The passage of custody and title at the line was held immaterial. We see no distinction between a sale at or before reaching the state line.

3. *The sales are "sales for resale" although only 25% is resold by the Navy.*—The Company has also contended that since only about 25% of the total energy sold to the Navy is resold by it, the status of the larger percentage should determine which of the two agencies, State or Federal, has jurisdiction over the whole. Alternatively, the Company has urged that jurisdiction over the sale should be so divided that the Federal Commis-

[28] In the *Connecticut* case, where the Company sold electric energy to the Borough of Groton, which, with the knowledge of the Company, resold a part of the energy, it was accepted without question on this aspect of the matter, that the sale was a "sale for resale" within Section 201 (d).

sion's authority embrace only the portion of the energy which is resold. Since the California Commission did not deal with this claim, its opinion contains no findings relative to the proportion resold by the Navy. On the basis of the undisputed evidence contained in the record made at the joint hearings, however, the Federal Commission found (R. 28):

> * * * For the period of 1943 to 1948, inclusive, the percentage of energy resold by the Navy (of the total purchased and generated by Navy) ranged from 15.5% to 28.6%, the average being 18.7%. In 1949, approximately 24% of the 6,423,272 kwh purchased and generated by the Navy was resold to the business concessions and residents occupying the Navy's low-cost defense housing project (1,170 units located on the reservation).

These contentions seek to raise objections to the Federal Commission's jurisdiction over mixed and commingled energy, which have been consistently rejected by the Federal Power Commission and the Court.[29] Indeed, in no instance where the Federal Commission has asserted jurisdiction,

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[29] *E. g.*, *Kansas Gas and Electric Company*, 1 F. P. C. 536, 543–544, 26 PUR (NS) 259; *Hartford Electric Light Company*, 2 F. P. C. 359, 365–366, 37 PUR (NS) 193, affirmed, 131 F. 2d 953 (C. A. 2), certiorari denied, 319 U. S. 741; *Chicago District Electric Generating Corporation*, 2 F. P. C. 412, 416, 39 PUR (NS) 263; *Connecticut Light & Power Company*, 3 F. P. C. 132, 141–142, 44 PUR (NS) 170, set aside on other aspects, 324 U. S. 515; *Safe Harbor Water*

they shall control until and unless superseded by new rates filed by the Company or by rates fixed by the Commission. Aside from some minor, and, we think, inconsequential objections of a procedural nature, the issue posed by the petition is whether the rates are subject to the Commission's filing requirements, or whether, as the petitioner contends, the Public Utilities Commission of California, either alone or in conjunction with the Public Service Commission of Nevada, has jurisdiction over the rates charged these customers.

Petitioner owns and operates an interconnected system for the generation and distribution of electric power in California and Nevada. The power sold to the Navy and to Mineral County is generated in and transmitted from petitioner's Northern Division plants in California.[1] Most of it comes from three plants in petitioner's Mono Basin system, these being hydroelectric projects licensed by the Commission under § 4 (e) of Part I of the Federal Power Act to operate on the public lands. The energy sold the Navy is delivered to Navy-owned transmission lines at petitioner's Mill Creek plant in Mono County, California. From there it flows through the Navy's lines across the California-Nevada state boundary to the Naval Depot at Hawthorne, Nevada. Similarly the electric energy sold Mineral County is delivered at the Mill Creek plant to Mineral County, which transmits the energy across the state border over its own line

[1] The Commission found that petitioner's facilities utilized in these sales are facilities used for the transmission of electric energy in bulk, not for local distribution.

for resale to consumers in Mineral County. These lines in each instance are 55,000 volt transmission lines. At Hawthorne, Nevada, the energy in both instances is transformed to lower voltages for distribution.[2]

As regards the Navy, the power it purchases or generates is used to operate the Navy's various facilities at the Depot, and, in addition, to supply the needs of the occupants of a housing project which was built for and is occupied by civilian employees of the Depot, as well as the energy needs of the operators of the Depot's various concessions. Each housing or business unit has a separate meter, and the occupant thereof is billed and required to pay for the energy which he consumes. From 1943 to 1948,[3] between 15.4% and 28.6% of the Navy's yearly total power supply was resold to these residents and business concessions, the amount resold averaging 18.7% of the yearly total. By contract entered into in 1943 petitioner and the Navy agreed upon the rates to be charged for the energy furnished. This contract was not filed with the Power Commission as a rate schedule, but petitioner charged the contract rates until 1948, when it obtained from the California Public Utilities Commission a rate increase in respect of certain designated customers, including Navy,

[2] In addition to the energy purchased from petitioner, the Navy generates a small part (approximately 7.5% of the amount purchased from the petitioner) of its own requirements on three Diesel generators located at the Naval Depot.

[3] The present proceeding was begun by order to show cause issued February 15, 1950.

whom petitioner was serving under special contracts.

The properties and facilities of the Mineral County power system belong to and are operated by the County under the direction of its Board of Commissioners who ex-officio constitute the board of managers of the county-owned facility. Petitioner has sold to the County the power required for the system under a series of three-year contracts providing that at rates set forth in the contract petitioner would furnish and the County would purchase all of the energy required by the latter for resale and distribution to the ultimate consumers in the state of Nevada.

Petitioner argues that since it is a licensee under Part I of the Federal Power Act its rates to Navy and to Mineral County are to be regulated by the Commissions of Nevada and California under § 20 of the Act, and that they are not subject to regulation under Part II, §§ 201, 205 and 206.[4] The contention is not different from that made and rejected in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, 418, where the Court said that Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which necessarily must be

[4] The Commission found that the Nevada Commission has not been given jurisdiction by Nevada statutes over petitioner's charges to Mineral County or to the United States as contemplated by §§ 19 or 20, hence alternative jurisdiction is by those sections conferred upon the Federal Power Commission. Petitioner assails the finding, but we think it unnecessary to resolve the dispute.

accomplished by the Federal government. It was thought that the program formulated by the Act would be hindered, not helped, if Part I licensees were held impliedly exempt from the more expansive regulation provided by Part II.

The transactions in question manifestly constitute sales by a public utility of electric energy in interstate commerce. It is of no moment that petitioner's facilities for the transmission and sale of the energy are all located in California and that those used to transmit it across the line into Nevada are owned by the purchasers of the energy. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83; *Federal Power Commission* v. *Arizona Edison Co.*, 9 Cir., 194 F. 2d 679.[5] Nor is it of consequence, as the petitioner contends, that in one instance the energy is transmitted across the state line by the United States. *Federal Power Commission* v. *Arizona Edison Co., supra*, p. 681. The question is not whether the United States is in interstate commerce, but whether petitioner is. But it is urged that sales to the United States or to Mineral County are not at wholesale within the Act's intendment since § 201 (d) defines sales at wholesale as sales to any *person* for resale, and neither the United States nor Mineral County is by definition a person. Sections 3 (4) and 3 (3) of Part I and 201 (f) of Part II of the Act are appealed to in support of the argument. Section 3 (4) defines the word "person" as meaning "an

[5] Sec. 201 (c) of the Act provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof. . . ."

individual or a corporation," and § 3 (3), defining "corporation," excludes municipalities from the definition. Section 201 (f) will be noticed in a moment.

The argument here predicated on § 201 (d) was made to the Seventh Circuit in the recent case of *Wisconsin-Michigan Power Co.* v. *Federal Power Commission,* 197 F. 2d 472, where a number of municipalities were involved as purchasers for resale. Upon consideration of the legislative history and gradual development of the several provisions of the Act, together with the policy of the legislation as a whole, the court concluded (p. 479) that Congress did not intend to exclude from its definition of sales at wholesale sales to municipalities for resale. It thought that to construe the Act as the power company contended would be to neglect other provisions, such as §§ 306 and 313 (a), relating to complaints by municipalities, and to leave those bodies open to the rankest discrimination.

We agree with the Seventh Circuit that reference back to the early definitions contained in Part I should not be permitted to thwart the general policy manifested by the statute as a whole. It seems more than probable that the significance of those definitions was overlooked in the later formulation of Part II.

Nor is § 201 (f) of help to the petitioner. This section states that "No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State. * * *" It is clear that the intended exclusion or exemption is from the regulatory burdens of the statute. For the purposes of the

Act these public bodies are simply not deemed to be public utilities. But it would be inconsistent with the policy of the legislation, as well as with certain of its provisions already mentioned, to hold that, as wholesale purchasers of power, they are excluded from the benefits of the regulation of the utilities from which they buy. The entire thrust of Part II is toward the seller at wholesale, not the buyer.

Petitioner's sales to Mineral County are substantially in their entirety sales of energy for resale. But in respect of the United States it is contended, on several grounds, that the sale to the Navy is not for resale within the intendment of the Act. The principal of these grounds is that only a minor percentage of the amount sold the Navy was resold by it.[6] Another objection to Commission jurisdiction is that the Navy resells at a low rate; and a third is that petitioner's contract made no reference to resale and that petitioner did not intend to sell for resale.

We turn first to the latter objections. The Commission found as a fact that the energy in question was resold to ultimate consumers and consumed in Nevada. It found also that petitioner had knowledge of the resales. We are not persuaded that an express agreement or an intention on the Company's part that the energy shall be resold is required in order to confer jurisdiction. It appears without dispute that the only reason the service was not rendered by the local electric utility (Mineral County) was the latter's financial inability to undertake the busi-

[6] As observed above, the actual percentage of power resold fluctuated rather widely, averaging 18.7% of the yearly total.

ness, hence the necessity of the Navy's action. As to the rate at which the Navy sells, we agree with the Commission that the public interest is involved in the Company's rate to the Navy, whether the burden of possibly excessive rates were to fall on the ultimate consumer of the energy or on the nation's taxpayers.

Petitioner's argument of lack of jurisdiction based on the percentage of power resold seems finally to have resolved itself down to the proposition that the percentage consumed by the Navy should be held subject to State regulation, and only the part resold regarded as subject to regulation by the Commission. In rebuttal the Commission cites *Jersey Central P. & L. Co.* v. *Federal Power Commission,* 319 U. S. 61; *Connecticut L. & P. Co.* v. *Federal Power Commission,* 324 U. S. 515; and *Hartford E. L. Co.* v. *Federal Power Commission,* 2 Cir., 131 F. 2d 953, certiorari denied, 319 U. S. 741, dealing with commingled flows of outstate and intrastate energy. It is unnecessary to discuss these cases in view of the very recent decision in *Pennsylvania Water & Power Co.* v. *Federal Power Commission, supra,* which deals with the same problem. Although the situations are not identical, we are inclined to think that the *Penn Water* case in principle disposes of petitioner's argument. There the power company contested the Commission's jurisdiction to regulate its sales in Pennsylvania to Pennsylvania utilities on the ground that 83% of the energy so sold was intrastate energy developed in Pennsylvania, only 17% coming from Maryland. The Court said that the Commission "has

APPENDIX A

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 803, 838, 16 U. S. C. 791a *et seq.*) are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

* * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * *

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regu-

complete authority to regulate all this commingled power flow."

Here, as in the *Penn Water* case, the supposed nonjurisdictional part of the energy is indistinguishable at the point of sale from the remainder. Moreover the amount resold is not constant, but fluctuating. The Commission contends that it is not practicable to segregate the jurisdictional from the alleged nonjurisdictional part. It seems clear, although petitioner contends otherwise, that the only mode of segregation would be by separating the two loads and supplying each by an independent transmission line from the point of metering and purchase to the Depot.

In virtually all sales of power to a public body, such as a municipality, we would suppose that some part of the energy is used by the purchaser for its own purposes, the rest being resold to the consuming public. It would create untold difficulty and confusion if petitioner's argument in respect of severability for rate regulation purposes were to be given countenance.

The Commission's order is affirmed.

(Endorsed:) Opinion. Filed Oct. 14, 1952. Paul P. O'Brien, Clerk.

lation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, * * * shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and

declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *.

SEC. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hy-

droelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 202. * * * * * * *

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

* * * * * * *

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be

made and the time when they shall take effect and the manner in which they shall be filed and published.

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SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * *

SEC. 306. Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in

such manner and by such means as it shall find proper.

* * * * * *

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of

such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 12,987—October 14, 1952

CALIFORNIA ELECTRIC POWER COMPANY, A CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AND

COUNTY OF MINERAL, STATE OF NEVADA, AND UNITED STATES OF AMERICA, INTERVENORS

UPON PETITION FOR REVIEW OF AN ORDER OF FEDERAL POWER COMMISSION

Before: MATHEWS, HEALY, and ORR, Circuit Judges.

HEALY, Circuit Judge.

California Electric Power Company petitions for review of an order of the Federal Power Commission directing it to cease and desist from charging two Nevada customers (the Department of the Navy and Mineral County, Nevada) any rate other than "filed rates" for electric energy it sells those customers.

The Commission's order does not assume to perpetuate the "filed rates," but provides only that